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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-652

ANTHONY FRANCIS CATERINE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ANTHONY FRANCIS CATERINE, JR.,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

United States v. Caterine is reported at 517 F.2d 246 (5th Cir. 1975) (Appendix I). The Motion For Rehearing was overruled on October 3, 1975. (Appendix II) Stay of the Mandate has been issued pending petition for writ of certiorari being filed in the Supreme Court and while such petition is under consideration in this Court. (Appendix III) Co-Defendant Herbert Mikelberg is filing a petition in this Court and Caterine

hereby adopts the points and authorities contained therein.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered on August 11, 1975. The Motion For Rehearing was filed August 25, 1975. It was overruled October 3, 1975. This Petition For Writ of Certiorari is filed within thirty (30) days of the date of overruling the Motion For Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN *SUA SPONTE* REFUSING TO ALLOW ANY CROSS EXAMINATION OF A GOVERNMENT WITNESS AFTER SUCH WITNESS FAILED TO TESTIFY AS EXPECTED BY THE GOVERNMENT AND THE GOVERNMENT WAS ALLOWED TO IMPEACH HIM?

II. WHETHER 15 U.S.C. § 1644 (1970) IS SO VAGUE AND INDEFINITE AS TO BE VOID FOR UNCERTAINTY UNDER THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, FIFTH AMENDMENT, DUE PROCESS CLAUSE?

III. WHETHER THE TERM "TRANSACTION" AS USED IN 15 U.S.C. § 1644 (1970) HAS BEEN EXPANDED BEYOND ITS CORRECT MEANING BY JUDICIAL ACTION SO AS TO INVALIDATE

THE CONVICTION OF THE DEFENDANT UNDER THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, CLAUSE 3 AND FIFTH AMENDMENT, DUE PROCESS CLAUSE?

IV. WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article I, Section 9, reads in pertinent part as follows:

> No Bill of Attainder or ex post facto Law shall be passed.

The United States Constitution, Fifth Amendment, reads in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Sixth Amendment, reads in pertinent part as follows:

> In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.

Title 15 U.S.C. § 1644 (1970) reads as follows:

> Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Title 15 U.S.C. § 1644 was enacted October 26, 1970 and was amended effective October 28, 1974. The text of the amendment is set out in Appendix IV. So far as counsel for the Petitioner has been able to determine, this is the first occasion that either the original statute or the amended statute has been presented to the Supreme Court for construction.

Caterine was convicted on three counts, one charging conspiracy and two charging aiding and abetting violations of § 1644. The government's case primarily depended on testimony of co-defendants William A. Davis, Lester Ray Henderson and Rita Kay Kenner. (A. 157-344; 344-504; 735-843) The evidence indisputably showed a large scale scheme to make fraudulent credit card applications to several different credit card companies and to use the cards to make large numbers of purchases and dispose of the goods obtained with the cards to various persons. Henderson, Kenner, Davis and one Richard Payne made applications, and through a bartending school

they operated, verified employment and credit information for each other.

The Petitioner Caterine bought many airline tickets over a period of many months from Henderson. The record in this case is long and complex, but there is no evidence in the case, direct or circumstantial, that the Petitioner Caterine had any idea of the manner in which the cards were obtained. Other than the fact that he purchased airline tickets, the only link between Caterine and the cards is a conversation overheard by one witness in which Henderson told Caterine that he had a good many credit cards that he was paying the charges on but at some future date might not pay on. There is a second conversation relied upon in the opinion of the Fifth Circuit, but there is no evidence that the Defendant was even present at that conversation. (A. 538-539; 542-543) The witness Henderson never testified that Caterine knew the cards were obtained fraudulently, and in fact, he indicated he got the cards without the aid or knowledge of Caterine.

In the course of the trial, the government called one William Payne who testified that he was unable to identify either Caterine or Mikelberg, that he was unable to remember any conversations with the Defendant Caterine. (A. 506-509) Upon hearing this, the Assistant United States Attorney commenced showing the witness what he identified in the presence of a jury as a certified jury transcript of Payne's testimony. (A. 509) He claimed that he was showing the transcript to refresh Payne's recollection. (A. 509) The witness was required to read the transcript in the presence of the jury. He was then asked if he recalled any conversa-

tions with Caterine. After objection to such question by counsel for the Defendant, the Assistant United States Attorney claimed surprise at Mr. Payne's testimony. After motions for mistrial and to strike the witness's testimony were overruled, the Court stated:

> I think its obvious the witness is not going to answer, and since he has directed no answers to your questions, there is no cross examination. You may be excused Mr. Payne. (A. 515)

REASONS FOR GRANTING THE WRIT

I. The Opinion Of The Fifth Circuit Is In Irreconcilable Conflict With *Brookhart v. Janis*, 384 U.S. 1 (1966) And Other Decisions Of This Court.

The questions of confrontation of witnesses and effective assistance of counsel are always of great importance to criminal defendants. In the case at bar, the United States Government, although it did not produce evidence directly harmful to Caterine by the witness Payne, surely prejudiced him before the jury since the clear implication to the jury was that the witness had been influenced by Caterine. The counsel for the Defendant was not allowed to dispel this impression. Although the Court did offer him an opportunity to call a witness as his own, such a remedy is surely an ineffective substitute for cross-examination. In *Brookhart v. Janis*, 384 U.S. 1 (1966), the Court held that if there is a denial of cross-examination without waiver, it is Constitutional error and there is no necessity for showing prejudice. The

facts in *Brookhart*, although vastly different from those in the case at bar, were unusual as are the facts in this case.

In *Brookhart* there was a question of waiver and there is likewise a question of waiver in this case. Counsel for the Petitioner Caterine first objected to the Court's ruling and then withdrew the objection. Petitioner contends that the ruling of the Court made prior to any attempt to cross-examine is of such a magnitude that counsel could not waive it for Caterine.

This case presents an opportunity for this Court to extend its holding in *Brookhart v. Janis*. The actions of the trial Court were clearly in denial of the Sixth Amendment and this matter is of sufficient importance to require an opinion by this Court.

II. The Opinion Of The Fifth Circuit That 15 U.S.C. § 1644 Is Not Void For Uncertainty Is Contrary To Many Decisions Of This Court.

The Supreme Court in *United States v. Bass*, 404 U.S. 336 (1971) at 496 said:

> First, as we have recently reaffirmed "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"...

In *Bass* and in numerous other cases, the Supreme Court has held that penal statutes should be construed strictly and that before the harsher alternative

reading of a statute should be accepted that Congress should be required to have spoken in clear and definite language. *United States v. Bass, supra; United States v. Campos-Serrano*, 404 U.S. 293 (1970); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction*, 249 U.S. 385 (1926).

The Congress of the United States seems to agree with the contention of the Petitioner that the statute is vague as originally enacted, since it amended the statute while the case was on appeal and while the statute was being attacked as vague and indefinite. The statute is vague because it does not define the term "transaction." Mr. Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 494 (1970) noted that "transaction" is a word of flexible meaning. "Transaction" has been used in so many different ways over the years that it is not a term of definite meaning any longer. The Fifth Circuit's decision in affect destroys the attempt of Congress to limit federal involvement in credit card cases. The facts of this case reveal that as to each count the airline tickets were purchased in several different cities over periods of up to a year.

The statute simply does not give adequate notice of what conduct is prohibited.

III. The Terms Of 15 U.S.C. § 1644 Have Been So Altered By Judicial Construction As To Constitute An Ex Post Facto Law.

Even if the term "transaction" is sufficiently definite to apprise a man of what is meant, the Court in

its charge has so expanded the definition of transaction as to include in the ambit of the statute conduct not reasonably stated by the Congress. *United States v. Wiltberger*, 5 Wheat. 76 (1820); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) The Court in its charge defined transaction for the jury as an affect being dependent upon the intent and motive of the accused. This definition is contrary to all other definitions given the word "transaction" in the past. (R. 23, P. 4) It is also contrary to the definition in *United States v. Maze*, 414 U.S. 399 (1974) where each use was said to be a transaction. The Court informed the jury that transaction may include more than one purchase so long as there is a common scheme or design behind the purchases. Petitioner does not contend that transaction is limited to one single purchase or use of the card. The opinion of the Fifth Circuit upholding the Court's definition of transaction is contrary to this Court's opinion in *Blockburger v. United States*, 284 U.S. 299 (1932) The Court's opinion is also contrary to *United States v. Hale*, 456 F.2d 435 (5th Cir. 1972) and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), both of which state that transaction depends upon the logical relationship of the occurrence. The Fifth Circuit opinion in this case is also contrary to *United States v. Pettis*, 396 F.2d 800 (6th Cir. 1968); *Wilburn v. United States*, 326 F.2d 903 (5th Cir. 1964); *Halverson v. United States*, 162 F.2d 308 (9th Cir. 1947) and *Bins v. United States*, 331 F.2d 390 (5th Cir. 1964) In the cases cited, the Courts have found that transaction does not depend upon the number of unlawful motives in the mind of the defendant, but whether separate and distinct prohibited acts made punishable have been committed. *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940)

In each of the cases cited, like criminal actions were held to be separate transactions even though they were perpetrated pursuant to a common scheme or agreement.

IV. There Is No Evidence That Petitioner Had Knowledge Of The Manner In Which The Cards Were Obtained And There Is No Evidence Of A Single Transaction Which Will Be Recurring Problems Under Future Prosecutions.

The opinion of the Fifth Circuit seems to conclude that mere knowledge that the cards would be burned, that is would be used to make charges that would not be paid for, is sufficient to uphold a conviction under the statute. The Court's opinion is in direct contradiction to *Ingram v. United States*, 360 U.S. 672 (1959) and *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). In *Direct Sales*, the Court said:

> Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. Thus, charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what in that case was called a dragnet to draw in all substantive crimes. (Referring to *United States v. Falcone*, 311 U.S. 205 (1940))

Moreover, there was more than one transaction even if Caterine had the requisite guilty knowledge. The government in an effort to meet the statutory requirement lumped together many purchases made in separate cities over a period of months. This aggregating is based upon a misconception of the statute. The statute requires a transaction involving $5,000 or more affecting interstate commerce. It is irrelevant what transaction there was between the principals and the aiders and abetters.

It is interesting to note that in *Maze v. United States*, 414 U.S. 395 (1974), the government contended that each use of the credit card constitutes a separate transaction. It would seem that the government's definition of transaction varies to suit the necessities of any given case. This Court should, once and for all, define transaction in a meaningful manner.

The cases cited above lend credence to Petitioner's argument that the facts of this case do not present any single transaction involving $5,000 and affecting interstate commerce. Usually the question presented is whether a single act may be broken down as a separate and distinct transaction upon the basis of several different counts in the indictment. Here the question is whether a single offense is shown by proof of a transaction made up of many separate acts.

Undoubtedly prosecutions under § 1644 will increase with time in as much as there are many thousands of such credit cards in use and because of the ease in which a card may be fraudulently obtained.

This Court should at this time clarify what is and what is not properly an offense under the statute.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon Hon. Robert H. Bork, The Solicitor General, Department of Justice, Room 5612, Washington, D.C. 20543 and Harold Jaquet, U.S. Attorney's Office, 1100 Commerce St., Dallas, Texas 75202, postage prepaid this ____ day of October, 1975.

Arthur Mitchell

Stephen M. Orr

APPENDIX I

UNITED STATES of America,
Plaintiff-Appellee,

versus

Herbert MIKELBERG and Anthony F. Caterine,
Defendants-Appellants.

No. 74-2518

United States Court of Appeals,
Fifth Circuit.

Aug. 11, 1975.

Appeals from the United States District Court for the Northern District of Texas.

Before THORNBERRY, COLEMAN and ROSENN,* Circuit Judges.

COLEMAN, Circuit Judge.

In 1970, as a part of an extensive Act dealing with federal deposit insurance, the maintenance of bank records, the report of certain currency transactions, "and for other purposes", the Congress legislated with reference to credit cards, now 15 U.S.C., § 1644, as follows:

* Of the Third Circuit, sitting by designation.

"§ 1644. Fraudulent use of credit card

"Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

It will be noted that the statute uses both words, "transaction" and "card", in the singular.

The sparse legislative history is found in a six line portion of the conference report, U.S. Code Congressional and Administrative News 1970, 91st Congress, Second Session, II, p. 4414:

"Credit Cards

"Title V — Provisions Relating to Credit Cards

"The Senate bill attached a new title V (amending the Truth-in-Lending Act) regulating the issuance of credit cards, creating liability for the unauthorized use of credit cards, and providing criminal penalties for certain unauthorized uses. The House agreed to the Senate language with an amendment limiting criminal penalties for use of illegally obtained cards to cases involving amounts of $5,000 or more."

The conference report thus emphasizes that criminal penalties for the unauthorized use of credit cards are limited "to *cases* (emphasis ours) involving amounts of $5,000 or more".

The legislation is so new that we have been unable to find a single appellate decision defining the meaning of "a transaction" as used in the Act.[1]

The appellants presently before us were indicted and convicted under the terms of the original statute. In 1974, Congress extensively amended § 1644.[2]

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1 The Supreme Court noted the existence of the statute in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 650, 38 L.Ed.2d 603, and we did the same in United States v. Green, 5 Cir., 1964, 494 F.2d 820, 826, but these were mail fraud prosecutions, 18 U.S.C., § 1341, and neither the Supreme Court nor our Court attempted any discussion of § 1644. Such discussion would, of course, have been dicta.

2 "134. Fraudulent use of credit card

"(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one year period has a value aggregating $1,000 or more; or

"(b) Whoever, with unlawful or fraudulent intent, transports or attempts or conspires to transport in interstate or foreign commerce a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

"(c) Whoever, with unlawful or fraudulent intent, uses any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

"(d) Whoever knowingly receives, conceals, uses, or transports money, goods, services, or anything else of value (except tickets for interstate or foreign transportation) which (1) within any one-year period has a value

The alleged conduct of the appellants clearly falls within the terms of the amended statute, but we confront the question of whether it was covered by the 1970 Act since no single interstate transaction of theirs involved as much as five thousand dollars.

I

The Substantive Counts

On February 12, 1974, along with Lester Ray Henderson and William Allen Davis who are not involved in this appeal, Caterine and Mikelberg were indicted in the United States District Court for the Northern District of Texas in a nine page, four count indictment. The first count was for conspiracy to violate § 1644, the remaining three counts for substantive violations of the statute. Count II disappeared from the case. The defendants were convicted on Counts I, III, and IV.

---

aggregating $1,000 or more, (2) has moved in or is part of, or which constitutes interstate or foreign commerce, and (3) has been obtained with a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card; or

"(e) Who knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transportation, which (1) within any one-year period have a value aggregating $500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards; or

"(f) Whoever in a transaction affecting interstate or foreign commerce furnishes money, property, services, or anything else of value, which within any one-year period has a value aggregating $1,000 or more, through the use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained — shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

We state the substantive counts first.

Count III charged that *from* on or about December 1, 1971 through February 29, 1972, Caterine, Mikelberg, and Henderson did, in a (emphasis ours) transaction affecting interstate commerce, use a fraudulently obtained American Express card issued in the name of Richard Pittman to obtain goods and services having an *aggregate* (emphasis ours) retail value in excess of five thousand dollars, in violation of Title 15, United States Code, § 1644, and Title 18, United States Code, § 2.

Count IV charged that from January 1, 1972 to March 31, 1972, Caterine, Mikelberg, and William A. Davis committed the same offense, using an American Express card issued to William A. Davis.

II

The Conspiracy Count

[Count I]

This count charged that from September 1, 1971 to May 1, 1972, Caterine, Mikelberg, Henderson, William A. Davis, and unindicted co-conspirators Rita Kenner and Richard Payne, committed a highly detailed conspiracy (thirty overt acts) to use fraudulently obtained credit cards issued by American Express and other companies. The various overt acts all involved airline tickets. No averment appeared in the count as to the value of any airline ticket but obviously none of them individually amounted to as much as five thousand dollars.

III

The Underlying Facts

The record clearly reveals an organized scheme to make fraudulent applications for and thereafter to use credit cards for the purchase of goods which could be sold for cash.

The proof for the government depended primarily on the testimony of the co-defendants William A. Davis[3] and Lester Ray Henderson.[4]

The evidence showed that these two, along with the appellants, conspired with Richard William Payne,[5] Richard Green,[6] and Rita Carpenter Green[7] to make the fraudulent credit card applications. Davis, Henderson, and Payne made the applications. They operated a bartending school, would give the school as a reference, thereby verifying employment and credit information for each other.

Using both real and assumed names, applications were made to American Express, Diner's Club, Carte Blanche, TWA, American Airlines, and others. Frequently, several cards were obtained from the same company.

---

3 Also known as William C. Tucker.

4 Also known as Clinton R. Pittman.

5 Also known as Richard Kenner.

6 Also known as Richard Traylor.

7 Also known as Rita Payne, Rita Kenner, or Kay Kenner.

Occasionally, the group bought and sold automobile tires, but they specialized in airplane tickets, which they resold for *half price*. Henderson testified that another use of the cards was the making of a "split ticket", such as, for example, a charge for a three dollar cocktail at Caterine's club would be accompanied by a ninety-seven dollar tip. He and Caterine would then divide the ninety-seven. The aggregate amount of the charges accomplished by this scheme reaches into the hundreds of thousands of dollars.

During the period in question, Caterine owned and operated a nightclub in Dallas known as the Losers Club. He also owned and operated T. C. Management Corporation, a booking agency for entertainers. Because transportation is frequently included in an engagement, Caterine gave many of the airline tickets (traceable to him) to entertainers whom he had booked all over the country.

Mikelberg apparently worked for Caterine, and at one point managed a clothing store for him.

Mrs. Kathleen Parish, a former bartender at the Losers Club, testified that in August, 1971, she overheard a conversation in the Losers Club between Lester Ray Henderson, Richard Payne, and both appellants. The group was discussing the use of credit cards, and how they could be used to acquire merchandise without paying for it. More specifically, they were discussing buying large quantities of tires.

She further testified to hearing Mikelberg tell this same group of a plan to obtain ten American Express,

ten Carte Blanche, and ten Diner's Club credit cards. He would then charge $10,000 worth of airline tickets on each card. Thereafter, he would take one card and its accompanying vouchers to each of the three issuing companies. By showing the companies a computer program which would prevent similar multiple charges in one day's time he hoped they would pay him to install the system. This plan was known to the participants as the "Mikelberg Special".

The record is replete with examples of each appellant giving tickets away and buying them at half price from one of the other co-conspirators. Martin Pinchinson, a former employee of Caterine's booking agency, once asked Caterine the source of a ticket Caterine gave him. Caterine replied that it was legal, that someone owed him money. On a similar occasion, Barbara Braswell, a former cashier at the Losers Club, asked Caterine why the amount on a credit card charge (she couldn't remember if it was for Payne or Henderson) was left blank. Caterine replied that it involved "a loan or some money". Lester Ray Henderson testified that he bought several tickets for Caterine at Caterine's request. He charged them on various credit cards, and was paid half their face value by Caterine. In addition, Henderson testified that Caterine allowed him to list his businesses as references when applying for credit cards. According to Henderson, Caterine made his "black list" of suspended credit cards, issued by the respective companies, available to him on request.

W. D. Gillham, a former bartender at the Losers Club, testified that Caterine once told him he had air-

line tickets available, and to let him know if he ever needed any. Frank Joiner, a talent agent, testified that Mikelberg told him he could get tickets at half price, and that he subsequently got tickets from Mikelberg for half their face value.

IV

The Issues

The respective appeals on behalf of Caterine and Mikelberg closely parallel each other.

1. Did the evidence show a transaction within the terms of 15 U.S.C., § 1644, that is, a *transaction* wherein fraudulently obtained credit cards were used to obtain goods or services having a retail value aggregating $5,000 or more?

The District Court instructed the jury:

> "The term 'a transaction' as used in the second element of the alleged offense does not mean a single sales event. The term 'transaction' may include more than one purchase or charge so long as there is a common scheme or design behind those purchases or charges. If there is proved beyond a reasonable doubt a common scheme or design with respect to the use of a fraudulently obtained credit card, then numerous purchases or charges can be linked to constitute a 'transaction' for so long as such common scheme or design exists."

The correctness of this instruction is the critical issue in the case, particularly that part of it which told the jury that "*numerous* purchases or charges" might be linked to constitute "a transaction" (emphasis ours).

Congress must have known that very few charges amounting to five thousand dollars or more were likely to be made at one time or place, i. e., in a single transaction, against a credit card. Nevertheless, it chose to use "transaction" *in the singular*, rather than the plural. Having done this, it also used "credit card" in the singular, followed by goods and services in the same manner but it concluded by allowing the requisite sum to be reached by aggregation.

Due process dictates that men of common intelligence cannot be required to guess at the meaning of a penal enactment. The decisions of the Supreme Court have never left any doubt about this principle.[8]

The requirements as to a *new* statute such as we have here are no less exacting. A case which promptly comes to mind is Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Under a recently enacted New Jersey statute, Lanzetta was convicted of being a gangster. In reversing the conviction the Supreme Court said:

8 Winters v. People of the State of New York, 333 U.S. 507, 68 S.Ct. 665, 91 L.Ed. 840 (1948); Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); United States v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); United States v. Sullivan, 332 U.S. 689, 68 S.Ct. 331, 92 L.Ed. 297 (1948), and many others.

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * * and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law'." [Emphasis added and Supreme Court citations of authority omitted].

We have only recently held that "Courts are compelled to construe [criminal statutes] rigorously in order to protect unsuspecting citizens from being ensnared by ambiguous statutory language", United States v. Insco, 5 Cir., 1974, 496 F.2d 204, a case involving the issue of whether campaign bumper stickers were included within the terms of a criminal statute. We held that the defendant could not be held to have had notice that the conduct in question was within the statutory terms. We concluded that "where freedom is at stake, ambiguities and doubts as to statutory application must be resolved in favor of the accused".

As authority we cited the language of the Supreme Court in United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1973):

> "First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity."

We also cited Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971), in which the Supreme Court reversed our affirmance of a conviction of defendants who conducted a lottery near a state line, whose customers traveled in interstate commerce to reach their place of business, but who did not themselves so travel, 18 U.S.C., § 1952. There, again, the Court said "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity", citing Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

These are the considerations in favor of the defendants, but this is not the end of the matter.

There is no room for doubt that Congress meant to prohibit, and the statute plainly forbids, the interstate use of fraudulently obtained credit cards in a transaction to obtain goods or services, or both, having a retail value aggregating $5,000 or more. As to all this there is nothing either vague or indefinite. The problem narrows to the perimeters of "a transaction". Under this statute, did the District Court correctly instruct the jury in that regard?

The Supreme Court appears to have partially answered the question in Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926) when it wrote:

> " 'Transaction' is a word of flexible meaning. It *may* (emphasis ours) comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."

Congress, in its effort to attack fraudulent abuse of credit cards, was concerned for jurisdictional purposes that the credit card transaction affect interstate or foreign commerce and that the goods obtained have "a retail value aggregating $5,000 or more". As reasonable individuals familiar with credit card transactions, we must assume that Congress knew that a single transaction by credit card would rarely exceed $5,000.

On the other hand, Congress was concerned that federal courts not be involved in frauds involving small amounts that might be handled readily in the state courts. The anomaly, however, is the preliminary phrase "in a transaction". To give it consistency with the rest of the sentence and provide meaning to the statute, we conclude that Congress intended to confine the aggregating of purchases only to those purchases made "in a transaction affecting interstate or foreign commerce". In other words, it was excluding any transaction in intrastate commerce. Limiting the statute to a single transaction aggregating $5,000 in purchases pragmatically would

render the statute useless. "A basic principle of statutory construction enjoins us from imputing to the Legislature an intent to produce an absurd result", Government of the Virgin Islands v. Hernandez, 3 Cir., 1975, 508 F.2d 712, citing Yankee Network, Inc. v. Federal Communications Commission, 1939, 71 U.S.App.D.C. 11, 107 F.2d 212, 219 and n. 34.

Additionally, we must take into consideration the provisions of 1 U.S.C., § 1.

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise — words employing the singular include and apply to several persons, parties, or things . . ."

Under the foregoing statutory rule of construction, the problem of whether the word "transaction" should be given a singular or plural meaning disappears. We are free to construe "in a transaction" in the fraudulent credit card statute in the plural as well as the singular, especially since a plural construction is the only way of giving the statute meaning. The statutory construction act in 1 U.S.C., § 1 has been construed by the Supreme Court and approved. *See* Barr v. United States, 324 U.S. 83, 65 S.Ct. 522, 89 L.Ed. 765 (1944), wherein the statute under construction in that case addressed itself to a singular rather than a plural "buying rate".

The strong presumptive validity that attaches to an act of Congress has led the Supreme Court to hold many times that statutes are not automatically in-

validated as vague "simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation", United States v. National Dairy, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1962) (citations omitted). In Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), the Supreme Court pointed out that the rule of lenity in the construction of a penal code "in no wise implies that language used in criminal statutes should not be read with a saving grace of common sense with which other enactments, not cast in technical language are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime".

On this line of reasoning, we are not prepared to hold erroneous the statutory construction embodied in the instructions of the Court. We decline to reverse on those grounds.

Issue No. 2

Under a wealth of authority too well known to require repetition, we hold that the evidence was sufficient to support convictions for conspiracy and for aiding and abetting. *See* Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1941); Lopez v. United States, 5 Cir., 1969, 414 F.2d 909; Mosheim v. United States, 5 Cir., 1960, 285 F.2d 949, 952, cert. denied 365 U.S. 868, 81 S.Ct. 903, 5 L.Ed.2d 859; Rodriquez v. United States, 5 Cir., 1967, 373 F.2d 17; Surrett v. United States, 5 Cir., 1970, 421 F.2d 403.

As to the conspiracy count, the jury had before it testimony indicating that during the period in question both Caterine and Mikelberg were buying airplane tickets for half their face value from Davis, Henderson, and Payne; that Lester Ray Henderson was applying for credit cards under aliases; that Caterine agreed to make available to Henderson credit card black lists; that Caterine gave Henderson names of people for whom he needed tickets; Mrs. Parish's testimony that she overheard a general discussion between Henderson, Payne, and appellants concerning running up excessive charges on credit cards with no intention of paying for the goods received; and, last, knowledge of the "Mikelberg Special".

As to Counts III and IV, which allege substantive violations, appellants' involvement is imputed to them by 18 U.S.C., § 2, which assigns the status of principal to anyone who wilfully causes the commission of an act against the United States. Both counts charge using a fraudulently obtained American Express card, one in the name of Lester Ray Henderson (Count III), and the other in the name of William A. Davis (Count IV).

Lester Ray Henderson testified that Mikelberg accompanied him to a bank to open a checking account, that he frequently bought tickets at Caterine's request in the names of Caterine's associates, and that Caterine would cash "split tickets" for him at the Losers Club. He testified that he sold Caterine liquor (which he had charged on an American Express card) at a 30% discount, and that he once sold appellants the airplane tickets at a 50% discount. Caterine and Mikelberg were the beneficiaries of almost every charge which Henderson made.

Count IV charged the same as Count III, except that it was William Davis who was allegedly aided.

Davis testified that he applied for the credit cards in question, and that some information on these cards was false. Most of the charges shown were for airplane tickets which were turned over to Henderson. He testified that he met Mikelberg in Atlanta, and discussed the purchasing of tickets with him and Henderson. He testified that he was given a list of names prepared by Mikelberg for whom to buy tickets. He did testify that he had only met Caterine once, and that was a brief exchange of pleasantries in a parking lot.

However, an important factor is that Davis knew everyone else involved in this case, and apparently participated to the fullest extent in all activities. He was a co-founder of the bartenders' school which was listed on all credit card applications as a reference and place of employment. What he did for one was of assistance to all.

One final point, Mikelberg and Caterine did not personally obtain the credit cards, but there was sufficient evidence in the record to support a jury finding that they knew the cards were fraudulently obtained.

Issue No. 3

Appellants next contend that assuming a transaction is found, there remains a question of *fact* for the

jury to determine whether interstate commerce was affected. They therefore object to the Court's instruction:

> "The fourth element necessary to be proved is that the transaction, if any, was one that affected interstate commerce. This is an issue of law for the court to determine. Whether a transaction did in fact occur is, however, an issue of fact to be determined by the jury in responding to the second element of the alleged offense. If you find beyond a reasonable doubt that the second element has been proved by the government, then such a transaction, if believed, affected interstate commerce and the fourth element is satisfied."

We have found no criminal case which addresses this point. Even if the point was for the jury to decide, the giving of this instruction was harmless error beyond a reasonable doubt. Applications were mailed to the card companies, most of the charges involved interstate airplane tickets, and the record is replete with examples of a member of the group traveling from state to state to purchase tickets. Even if the jury had been allowed to decide, the same result would have been imperative. For it to have found otherwise would be inconceivable.

Issue No. 4

As a final point, appellants have filed a supplemental brief which points out that 15 U.S.C., § 1644 was amended by Congress in October, 1974. They argue

that this amendment does not contain a clause saving all prosecutions pending at the time of amendment, and urge us to dismiss the case because the conviction was not final as of the date of the amendment.

The alleged violations of 15 U.S.C., § 1644 with which Caterine and Mikelberg are charged took place during 1970 and 1971. Appellants were indicted February 21, 1974, and convicted April 30, 1974. The statute was amended in October, 1974. Title 1 U.S.C., § 109 provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

See, also, United States v. Brown, 5 Cir., 1970, 429 F.2d 566, 568.

The remaining assignments of error do not merit discussion.

The convictions of both appellants are Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2518

D. C. Docket No. CR-3-74-91

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HERBERT MIKELBERG and
ANTHONY F. CATERINE,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before THORNBERRY, COLEMAN and ROSENN,*
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

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* Of the Third Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 11, 1975

Issued as Mandate:

APPENDIX II

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 3, 1975

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

TO ALL COUNSEL OF RECORD

No. 74-2518 — U.S.A. vs. Herbert Mikelberg and
Anthony F. Caterine

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no

member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied, as to Anthony F. Caterine.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. John H. Marks, Jr.
Mr. Arthur Mitchell
Messrs. Roger J. Allen
Charles D. Cabaniss
William F. Sanderson, Jr.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus No. 74-2518

HERBERT MIKELBERG and
ANTHONY F. CATERINE,
Defendants-Appellants.

ON CONSIDERATION OF THE APPLICATIONS of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including November 2, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above men-

tioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JAS. P. COLEMAN
UNITED STATES CIRCUIT JUDGE

APPENDIX IV

§ 1644. Fraudulent use of credit cards; penalties for violations

(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more; or

(b) Whoever, with unlawful or fraudulent intent, transports or attempts or conspires to transport in interstate or foreign commerce a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(c) Whoever, with unlawful or fraudulent intent, uses any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained; or

(d) Whoever knowingly receives, conceals, uses, or transports money, goods, services, or anything else of value (except tickets for interstate or foreign transportation) which (1) within any one-year period has a value aggregating $1,000 or more, (2) has moved in or is part of, or which constitutes interstate or foreign commerce, and (3) has been obtained with a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card; or

(e) Whoever knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transportation, which (1) within any one-year period have a value aggregating $500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards; or

(f) Whoever in a transaction affecting interstate or foreign commerce furnishes money, property, services, or anything else of value, which within any one-year period has a value aggregating $1,000 or more, through the use of any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing the same to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained — shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

As amended Pub.L. 93-495, Title IV, § 414, Oct. 28, 1974, 88 Stat. 1520.

Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-652 and 75-5678

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY FRANCIS CATERINE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HERBERT MIKELBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-652

ANTHONY FRANCIS CATERINE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-5678

HERBERT MIKELBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that 15 U.S.C. 1644 is unconstitutionally vague; that the trial court erroneously defined the term "transaction" in its instructions to the jury; that the evidence was insufficient to sustain petitioners' convictions; that the trial court erred in permitting a government witness to be excused without being subject to cross-examination; that the prosecutor made improper comments during closing argument; and that the court abused its discretion in sentencing petitioners.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of conspiring to use fraudulently obtained credit cards, in violation of 15 U.S.C. 1644 (count 1), and of aiding and abetting the use of fraudulently obtained credit cards, in violation of 15 U.S.C. 1644 and 18 U.S.C. 2 (counts 3 and 4). On counts 1 and 3, petitioner Caterine was sentenced to concurrent terms of two years' imprisonment and was fined $5,000; on count 4, he was placed on three years' probation, to be served consecutively to the sentences imposed on counts 1 and 3, and was fined $5,000. Petitioner Mikelberg was sentenced to concurrent terms of 18 months' imprisonment on counts 1 and 3 and was placed on four years' probation on count 4, to be served consecutively to the sentences imposed on counts 1 and 3. The court of appeals affirmed. 517 F. 2d 246.

Petitioners and others participated in a highly organized scheme to use fraudulently obtained credit cards to purchase hundreds of thousands of dollars worth of items, principally airline tickets that they resold at half price. Two of petitioners' co-conspirators, Lester Ray Henderson and William A. Davis, each pleaded guilty to one cour' of the indictment and testified for the government at petitioners' trial.[1]

Henderson testified that he charged numerous airline tickets on fraudulently obtained credit cards. Prior to making the purchases, Henderson would meet with Caterine and sometimes Mikelberg (A. 383, 385, 391, 395, 413, 420, 428)[2] to obtain the names of the persons for whom

[1]Rita Kenner and Richard W. Payne were also named as co-conspirators in count 1 but were not named as defendants.

[2]"A." refers to the appendix filed in the court of appeals.

the tickets should be purchased (A. 387, 395, 396, 414, 428). During one of his meetings with Caterine, Henderson said that he was going to apply for credit under the name of Clinton R. Pittman (A. 393). Henderson received aid from both Caterine and Mikelberg in obtaining credit cards under this name (A. 392-393, 502-503, 351-352, 391, 425). Henderson charged in excess of $5,000 worth of airline tickets (Govt. Exh. Series 8) on an American Express card issued to Clinton R. Pittman (count 3).[3] These tickets were given to Caterine, who paid Henderson one half their face value (A. 388-389, 410, 428-429).[4] Henderson also used this credit card to charge liquor that he later sold to petitioner Caterine at a 30% discount (A. 429-434).

Co-conspirator Davis testified that he applied for various credit cards in the name of William C. Tucker (A. 162-163) and gave other false information on his applications (A.

[3]Henderson officially changed his name to Clinton Pittman on May 11, 1971 (A. 484). However, he applied for credit cards, including the American Express card involved in count 3, prior to that date (A. 347, 390, 424).

[4]Kathleen Parrish, a former employee of petitioner Caterine, testified that in August 1971 she was present at a conversation in which petitioners, Henderson and Payne discussed the "burning" of credit cards—charging amounts far above the credit limit with no intention of making payment (A. 538-540). They discussed the charging of airline tickets and selling them at half price (A. 544). At that time petitioner Mikelberg said that he had his own plan for using credit cards (A. 543), which he later explained to at least Parrish and Henderson. This plan, which the participants referred to as the "Mikelberg Special" (A. 546), involved taking ten American Express, ten Carte Blanche and ten Diners Club cards, charging $10,000 worth of airline tickets on each card, then taking one card and the pertinent vouchers to the issuing company and trying to sell the company a computer plan whereby it could detect such fraud (A. 545-546). In many respects, the actual scheme was quite similar to this proposal.

165-170). Using names provided by Henderson (A. 315-316),[5] Davis purchased numerous airline tickets with these cards (A. 170-268). Those tickets that Davis did not personally use were turned over to Henderson (A. 267) in return for a percentage of their face value (A. 268). Davis charged $11,482.91 worth of airline tickets on an American Express card issued in his name (A. 247) (count 4) and turned over $9,152.64 worth of these tickets to Henderson (A. 246). Some of these tickets were purchased on a February 1972 trip to Atlanta (A. 264-265), during which petitioner Mikelberg had provided Davis with a list of names of persons for whom he should purchase tickets (A. 266).

1. Petitioners contend (No. 75-652 Pet. 7-8; No. 75-5678 Pet. 8-10) that the term "transaction" in 15 U.S.C. 1644 renders the statute unconstitutionally vague.[6] Petitioners also contend (No. 75-652 Pet. 8-10; No. 75-5678 Pet. 10-14) that the court erred when it instructed the jury that "[t]he term 'a transaction' may include more than one purchase or charge so long as there is a common scheme or design behind those purchases or charges." In this regard petitioners assert that if each presentation of a fraudulent credit card is a "transaction," the government failed to establish any one transaction which met the $5,000 jurisdictional amount of former Section 1644.

[5]Many of the tickets purchased by Davis with his TWA, American Express and American Airlines credit cards listed T. Caterine as the passenger (A. 172-203).

[6]15 U.S.C. 1644 provided that:

> Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

In 1974, Congress amended Section 1644. Petitioners' fraudulent scheme to purchase airline tickets clearly falls within the terms of the amended statute, which, in relevant part, provides (15 U.S.C. (Supp. IV) 1644(e)):

> Whoever knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transporation, which (1) within any one-year period have a value aggregating $500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards: * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The court of appeals correctly held, however, that Congress intended a flexible definition of "transaction," see *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610,[7] and that the district court's instruction was proper.[8] Con-

[7]There the Court said:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

[8]Contrary to petitioner Mikelberg's contention (No. 75-5678 Pet. 11-12), the court's instruction did not transfer to the jury the function of determining the law. The court clearly defined "transaction" and left for the jury the factual determination whether a fraudulent scheme existed.

Petitioner Caterine's reliance (No. 75-652 Pet. 9) upon *United States* v. *Maze*, 414 U.S. 395, and *Blockburger* v. *United States*, 284 U.S. 299, is misplaced. The statute considered in *Maze*, 18 U.S.C. 1341, specifically prohibits each fraudulent use of the mails without any monetary limitation and does not provide for the aggregation of the value of money or property fraudulently obtained. Thus, the Court's decision in *Maze* is not inconsistent with the district court's definition of "transaction." Nor is the district court's definition inconsistent with *Blockburger*, which held that two sales of morphine constituted two separate offenses despite the involvement of the same buyer and seller and the relatively short period of time between each sale. There is no reason why a series of events cannot be viewed as separate transactions for some purposes and a single, interrelated transaction for other purposes; here, for instance, each fraudulent purchase was doubtless a separate offense under state law, but this fact has no logical bearing on whether the series of purchases fall within the ambit of the federal prohibition.

gress clearly meant to prohibit, and the statute plainly forbids, the interstate use of fraudulently obtained credit cards to obtain goods or services, or both, with an aggregate retail value of $5,000 or more. This prohibition is neither vague nor indefinite. Moreover, Congress was aware that a single transaction by credit card rarely exceeds $5,000. The jurisdictional amount was imposed to protect federal courts from an inundation of fraud cases involving small purchases, but the principal limitation of the statute, as the court of appeals properly found (No. 75-652 Pet. App. 13a), is that it confines "the aggregating of purchases only to those purchases made 'in a transaction affecting interstate or foreign commerce.' " If the statute were further limited to single $5,000 credit card purchases, it would be rendered practically useless. Congress could not have intended such a result.[9] See *Government of the Virgin Islands* v. *Hernandez*, 508 F. 2d 712 (C.A. 3), certiorari denied, 422 U.S. 1043.

As thus construed, the term "transaction" is not so devoid of meaning as to render the statute unconstitutionally vague. The statute intelligibly forbids a definite course of conduct: fraudulent purchases of goods or services having a retail value aggregating $5,000 or more. "The fact that Congress might * * * have chosen [and in this case subsequently did choose] 'clearer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States* v. *Powell*, No. 74-884, decided December 2, 1975, slip op. 7, quoting *United States* v. *Petrillo*, 332 U.S. 1, 7.

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[9]An accepted statutory rule of construction is that words which employ the singular also include the plural. 1 U.S.C. 1; see, *e.g.*, *Barr* v. *United States*, 324 U.S. 83. To be consistent with the statutory provision that 15 U.S.C. 1644 permits an aggregation of the retail value of the goods and services fraudulently obtained, "transaction" must include a common scheme of fraudulent purchases.

2. Petitioners also contend (No. 75-652 Pet. 10-11; No. 75-5678 Pet. 14-20) that there was insufficient evidence to show that they knew the credit cards had been fraudulently obtained. As set forth above (pp. 2-4), the jury was aware that petitioners had received thousands of dollars worth of airline tickets at half their face value, that petitioners knew that Henderson had applied for credit under a false name, that petitioners had provided names to Henderson and Davis for ticket purchases, that petitioners and Henderson had discussed the "burning" of credit cards, that petitioner Caterine had permitted Henderson to use his business establishments as credit references and to consult his credit card black lists. Viewing this evidence in the light most favorable to the government, see *Glasser* v. *United States*, 315 U.S. 60, 80, the court of appeals correctly concluded that the jury could find beyond a reasonable doubt that petitioners knew the credit cards had been fraudulently obtained. Moreover, the evidence showed that petitioners had conspired to use and had aided and abetted the actual use of these fraudulently obtained cards.

3. Petitioner Caterine contends (No. 75-652 Pet. 6-7) that the district court erred in permitting a witness called by the government to be excused without being subject to cross-examination. Richard Payne, an unindicted co-conspirator, testified for the government before the grand jury prior to the return of the instant indictment. At trial, however, contrary to his grand jury testimony, Payne could not identify petitioner Mikelberg (A. 507) or petitioner Caterine (A. 507-509). The prosecutor gave Payne a transcript of his grand jury testimony, but it failed to refresh his recollection (A. 509-512). The government thereupon claimed surprise and was permitted to impeach the witness (A. 512-515). Payne claimed not only that he could not recall being asked during the grand jury proceeding whether he had a conversation with petitioner Caterine but also that he could

not even recall testifying before the grand jury (A. 515). Since, in the court's judgment, the prosecutor "ha[d] elicited no answers to [his] questions" (A. 515), the court, without objection, permitted Payne to be excused (A. 515).

The district court's action was proper. Since defense counsel did not object, petitioner cannot now complain that he was deprived of his constitutional right to confront adverse witnesses.[10] Moreover, petitioner's right to cross-examination extends only to those witnesses who testify against him. See, *e.g., California* v. *Green,* 399 U.S. 149, 154-165. Petitioner concedes (No. 75-652 Pet. 6) that the government's attempt to elicit testimony from Payne "did not produce evidence directly harmful" to his defense. In addition, the court instructed petitioners that they could call Payne as a witness, but neither did so.

4. Petitioners contend (No. 75-5678 Pet. 21-23)[11] that the prosecutor made improper comments in rebuttal argument. During closing argument, counsel for petitioner Caterine attacked the government's witnesses and charged that the government "should be ashamed to have brought before the

[10]Petitioner Caterine, relying upon *Brookhart* v. *Janis,* 384 U.S. 1, contends (No. 75-652 Pet. 6-7) that counsel could not waive the right to cross-examination. *Brookhart,* however, considered a unique Ohio practice which, if chosen by the defendant, required the state to make only a *prima facie* showing of guilt. (Since Ohio had no statutory plea of *nolo contendere,* this procedure was an attempt to circumvent the collateral effects of a plea of guilty for later civil suits arising out of the same factual situation.) The waiver of cross-examination in these circumstances was, in effect, a plea of guilty, and such a waiver could not be made without the knowledgeable consent of the defendant. Here, the waiver of cross-examination cannot be deemed the equivalent of a guilty plea.

[11]Petitioner Caterine (No. 75-652 Pet. 1-2) has adopted the issues raised by petitioner Mikelberg in his petition for a writ of certiorari.

people of this county such an array of debauched individuals" (A. 965). As a specific example of the alleged weaknesses in the government's case, defense counsel referred to witness Payne and his inability to remember anything (A. 965).

In rebuttal, the prosecutor argued in substance that the government must use "the type of testimony that we have" (A. 967) and that if it could not use testimony from the type of individuals who testified at the instant trial it "would probably be out of the business of prosecuting this type of case" (A. 967). The prosecutor's reference (A. 970) to Payne's inability to remember anything and to the fact that witnesses say one thing and "then when it comes time for trial, things are slightly shaded a different bit [because] * * * [t]hey are scared to death" were merely illustrations of problems encountered by the government in these types of cases. In context, these statements were proper. In any event, petitioners have not shown how they were prejudiced.[12]

The government concluded its rebuttal by stating that the jury could infer from the evidence that petitioners would be involved in crime for the rest of their lives (A. 972). This was a comment upon the evidence, not a statement of belief which implied that the prosecutor possessed some superior knowledge. Even if the comment was improper, the district court's immediate admonition to the jury to disregard it (A. 972) obviated any prejudice. The court did not err in refusing to grant a mistrial. See, *e.g., United States* v. *Hayes,* 444 F. 2d 472 (C.A. 5), certiorari denied, 404 U.S. 882.

[12]Petitioner Mikelberg (No. 75-5678 Pet 23) suggests only that the remarks were prejudicial because the evidence in the case was weak, implying perhaps that petitioner could only have been convicted on the basis of the prosecutor's closing statement. This argument is nothing more than a challenge to the sufficiency of the evidence, which, as we have shown above (p. 7) was clearly adequate to support the conviction.

5. Petitioners finally contend (No. 75-5678 Pet. 24-26) that the district court abused its discretion in sentencing them to imprisonment while Henderson and Davis received probation and fines after pleading guilty to one count of the indictment. Petitioners point to nothing beyond the disparity in sentences, which itself does not show that they were punished for exercising their right to trial by jury. *Hart* v. *Henderson*, 449 F. 2d 183 (C.A. 5). Their assertion that the innocent may be intimidated into pleading guilty by the sentences in this case is unfounded. Petitioners exercised their right to trial, and they were convicted by a jury on the basis of overwhelming evidence. They received sentences well within the statutory limit (see 15 U.S.C. 1644). Under these circumstances, there was no abuse of discretion. See, *e.g.*, *United States* v. *Stidham*, 459 F. 2d 297, 299-300 (C.A. 10), certiorari denied, 409 U.S. 868.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.